ATTORNEY FOR APPELLANT:

**MICHAEL D. GROSS**
Lebanon, Indiana

ATTORNEYS FOR APPELLEE:

**STEVE CARTER**
Attorney General of Indiana

**MATTHEW D. FISHER**
Deputy Attorney General
Indianapolis, Indiana

# IN THE COURT OF APPEALS OF INDIANA

| | | |
|---|---|---|
| CHARLES W. SNOW, | ) | |
| | ) | |
| Appellant-Defendant, | ) | |
| | ) | |
| vs. | ) | No. 06A01-0606-CR-264 |
| | ) | |
| STATE OF INDIANA, | ) | |
| | ) | |
| Appellee. | ) | |

APPEAL FROM THE BOONE SUPERIOR COURT II
The Honorable Rebecca McClure, Judge
The Honorable O.A. Kincaid III, Judge Pro Tem[1]
Cause No. 06D02-0504-CM-344

**April 4, 2007**

**MEMORANDUM DECISION - NOT FOR PUBLICATION**

**SULLIVAN, Judge**

[1] Due to the emergency absence of the regular judge, Judge Kincaid presided over the jury trial. Judge McClure, however, presided over the sentencing hearing and entered the sentencing order.

Following a jury trial, Appellant-Defendant, Charles Snow, appeals his conviction for Domestic Battery as a Class A misdemeanor[2] for which he received a one-year suspended sentence. Upon appeal, Snow claims there was insufficient evidence to support his conviction and that he received ineffective assistance of trial counsel.

We affirm.

At some point in the early evening of April 18, 2005, Snow and his wife, Amanda, argued at their residence on 349 Longley Drive, Lebanon. According to Amanda, the two were involved in a verbal altercation when Snow "flipped a cigarette" at her, burning her arm. Tr. at 27. Amanda testified that Snow then followed her into the kitchen, where she was "backed up against" a trash can, and the two were face to face as the they yelled at each other. Tr. at 27. According to Amanda, Snow shook his finger in her face and, as his "head was bobbing," hit her head with his head. Tr. at 30. Amanda received a raised welt, or "knot" as a result of the "head butt," which caused her to feel pain. Tr. at 35. Amanda had believed the act to be intentional at the time it occurred but testified at trial that she was unsure whether Snow had hit her intentionally. After receiving the hit to her head, Amanda walked away, and then she and Snow went to her parents' home. After arriving at her parents' home, Amanda and Snow continued fighting until, according to Amanda, her sister took Snow home. Snow returned in his truck, and after he "kicked [her] car in," Amanda called the police. Tr. at 31.

[2] Ind. Code § 35-42-2-1.3 (Burns Code Ed. Repl. 2004).

Lebanon Police Department Officer James Miller testified that he responded to the Snows' domestic disturbance on April 18, 2005 at approximately 7:30 p.m., where he found Snow to be angry and Amanda to be extremely upset, crying and shaking. According to Officer Miller, Amanda showed him the knot on the side of her forehead. Officer Miller also observed damage to a vehicle at the scene. At some subsequent point, Officer Miller arrested Snow.

Upon testifying, Snow stated that while he and Amanda argued on the evening in question which escalated until both of them were yelling at each other, and that he was "in her face," pointing a finger at her, his hitting her head was an accident. Tr. at 55.

During opening statements, defense counsel made two references to the fact that police had never before been called to Snow's house.[3] The State objected to defense counsel's first such reference, and the court, in overruling the State's objection, informed defense counsel that his comments were "open[ing] the door," to the State's alleged evidence regarding two prior incidents involving Snow. Tr. at 21. Defense counsel then stated that the police had never been called out to Snow's residence for any prior domestic situations. During trial, in response to the State's question on direct examination asking, "This isn't the first time that you've had to call the police on your husband, correct?", Amanda testified that police had twice before responded to incidents involving her and Snow. Tr. at 36 In one incident in Greencastle in which Snow and Amanda were involved in an argument, a neighbor had called police. A second time, in

[3] In his second such reference, defense counsel indicated that police had never been to Snow's residence "for any prior domestic situations in their time together." Tr. at 22.

Boone County in 2003, during a "heated argument," Amanda claimed she called police after Snow allegedly touched her, and that she had a mark on her back. Tr. at 37. In response, Snow testified that the only time police officers had been called to his house was in response to a verbal altercation in which no charges were filed.

Upon appeal, Snow, in claiming the evidence was insufficient to support a verdict finding him guilty of domestic battery, points to testimony suggesting the hit was an accident. When reviewing a challenge to the sufficiency of the evidence, this court will neither reweigh evidence nor judge witness credibility, but instead, considering only the evidence which supports the conviction along with the reasonable inferences to be drawn therefrom, we determine whether there is substantial evidence of probative value from which a reasonable jury could have concluded that the defendant was guilty of the charged crime beyond a reasonable doubt. Kien v. State, 782 N.E.2d 398, 407 (Ind. Ct. App. 2003), trans. denied.

Snow was charged and convicted of domestic battery as a Class A misdemeanor, meaning that he was found to have "knowingly or intentionally touch[ed] [his spouse] in a rude, insolent, or angry manner that result[ed] in bodily injury to [his spouse] . . . ." See I.C. § 35-42-2-1.3. Under Indiana Code § 35-41-2-2 (Burns Code Ed. Repl. 2004), a person engages in conduct "intentionally" if, "when he engages in the conduct, it is his conscious objective to do so." Also under I.C. § 35-41-2-2, a person engages in conduct "knowingly" if, "when he engages in the conduct, he is aware of a high probability that he is doing so."

Here, all witnesses testified that Snow was very angry, and even he acknowledged kicking a dent in Amanda's car. Snow does not dispute that in his anger he threw his cigarette down on the counter, and that the butt may have burned Amanda;[4] that he "approached her" in the kitchen, yelling, while her back was "to the trash can";[5] and that as he was yelling, he was "in her face," and his finger was "up" when his head hit hers. Tr. at 55. Further, Amanda testified that Snow "flipped a cigarette" at her, burning her, backed her up "against" a trash can as he yelled at her, pointed a finger in her face, bobbed his head and "head butt[ed]" her, causing a welt on her head. Tr. at 27, 35.

Given the above circumstances demonstrating Snow's anger and his forceful actions in Amanda's direction, together with the reasonable inferences which may be drawn therefrom, we conclude there was sufficient evidence for the jury to reasonably determine that Snow, at the very least, would have been aware of a high probability of touching Amanda in a rude, insolent, or angry manner resulting in bodily injury. See I.C. § 35-42-2-1.3. We therefore decline Snow's challenge to his conviction on the basis that there was insufficient evidence to support it.

Snow's second argument upon appeal is that he received ineffective assistance of trial counsel when counsel "opened the door" to evidence he claims would be inadmissible under Indiana Rule of Evidence 404(b). Snow further claims his counsel was ineffective for failing to object to this evidence and for failing to request the court to

[4] Snow did not contest the fact that his cigarette butt may have hit Amanda. He claimed, however, that if it did hit her, it was an accident.

[5] Snow testified that he approached Amanda, who was "very close with her back to the trash can," but not "up against the trash can." Tr. at 55. Snow further testified that Amanda had to "walk around" him to leave. Tr. at 55.

balance the prejudicial effect of such evidence under Indiana Rule of Evidence 403. The State responds by arguing that Snow suffered no prejudice because the challenged evidence was admissible under Rules 404(b) and 403 whether or not defense counsel "opened the door."

To prevail upon a claim of ineffective assistance of counsel, a defendant must demonstrate both that his counsel's performance was deficient and that he was prejudiced by such deficient performance. Polk v. State, 822 N.E.2d 239, 244 (Ind. Ct. App. 2005), (citing Strickland v. Washington, 466 U.S. 668, 687 (1984)), trans. denied. A counsel's performance is deficient if it falls below an objective standard of reasonableness based on prevailing professional norms. Id. at 245. To meet the appropriate test for prejudice, the petitioner must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. Id.; Strickland, 466 U.S. at 694. A reasonable probability is one sufficient to undermine confidence in the outcome. Strickland, 466 U.S. at 694. Failure to satisfy either prong will cause the claim to fail. Polk, 822 N.E.2d at 245. Most ineffective assistance of counsel claims can be resolved by a prejudice inquiry alone. Id.

We first observe that Snow's ineffective-assistance-of-counsel claim is before us upon direct appeal. In Woods v. State, 701 N.E.2d 1208, 1220 (Ind. 1998), cert. denied, 528 U.S. 861 (1999), our Supreme Court, in holding that claims of ineffective assistance of trial counsel raised upon direct appeal were not available for collateral review, observed that this rule would "likely deter all but the most confident appellants from asserting any claim of ineffectiveness on direct appeal." Indeed,

> "'[w]hen the only record on which a claim of ineffective assistance is based is the trial record, every indulgence will be given to the possibility that a seeming lapse or error by defense counsel was in fact a tactical move, flawed only in hindsight. It is no surprise that such claims almost always fail.'" Woods, 701 N.E.2d at 1216 (quoting United States v. Taglia, 922 F.2d 413, 417-18 (7th Cir. 1991)).

Here, Snow argues that his counsel rendered ineffective assistance by failing to adequately investigate the facts of the case prior to trial or to understand applicable law. With respect to the facts, we observe that during opening statements, after defense counsel stated that police had never before been called out to Snow's and Amanda's home, and the court responded to the prosecutor's objection by indicating that the State would be permitted to respond with evidence of prior incidents, defense counsel maintained his position, stating "I've spoken to my client already about it." Tr. at 21. Although it appears from the record that defense counsel was aware of two subsequent incidents involving Snow but not two prior incidents, we are ill-suited on this record to speculate as to whether counsel was misinformed as to the facts of the case and whether, if so, such was the result of deficient performance on his part.

We next consider Snow's claim of counsel's deficient performance on the basis that he "opened the door" to evidence that police had twice before been to his home in response to calls reporting incidents similar to the one at issue.[6] Snow further claims that counsel should have entered objections to such evidence under Indiana Rules of Evidence 403 and 404(b). "Otherwise inadmissible evidence may become admissible when the

[6] While Amanda testified that there were two prior similar incidents, one of which was for "battery" and that Snow had touched her, she also testified that she had a mark on her back which police never saw and that she could not recall what had happened. Tr. at 37. This testimony, while seemingly inconclusive, would nevertheless have had the unmistakable effect of suggesting to the jury that Snow had battered Amanda in the past.

defendant 'opens the door' to questioning on that evidence." Jackson v. State, 728 N.E.2d 147, 152 (Ind. 2000). When an appellant predicates an ineffective assistance of counsel claim on counsel's failure to object, the appellant must demonstrate that a proper objection would have been sustained. Rose v. State, 846 N.E.2d 363, 367 (Ind. Ct. App. 2006).

Indiana Rule of Evidence 404(b) states the following:

> "Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, provided that upon request by the accused, the prosecution in a criminal case shall provide reasonable notice in advance of trial, or during trial if the court excuses pre-trial notice on good cause shown, of the general nature of any such evidence it intends to introduce at trial."

In determining whether evidence is admissible under Rule 404(b), the trial court must (1) determine that the evidence of other crimes, wrongs, or acts is relevant to a matter at issue other than the defendant's propensity to commit the charged act; and (2) balance the probative value of the evidence against its prejudicial effect pursuant to Indiana Rule of Evidence 403. Spencer v. State, 703 N.E.2d 1053, 1055-56 (Ind. 1999) (citing Hicks v. State, 690 N.E.2d 215, 221 (Ind. 1997)).

The State argues that Snow suffered no prejudice by his counsel's "opening the door" and failing to object to the "other acts" evidence because such evidence was admissible under Rules 404(b) and 403 to show both Snow's and Amanda's relationship as well as an absence of accident. We note that the state of Snow's and Amanda's relationship was not at issue, however, as both Snow and Amanda agreed they were

fighting at the time of the alleged battery, so we question whether evidence of "other acts" to prove a fact not at issue would have withstood a Rule 403 challenge. Additionally, the more recent of the two "other acts" occurred approximately two to three years prior, and Amanda was unable to recall many details other than to say she had a mark on her back which the police did not see and she could not remember how she received it. Such multi-year delay further suggests that the evidence may have been more prejudicial than probative under Rule 403 with respect to establishing Snow's and Amanda's relationship. See Spencer, 703 N.E.2d at 1056.

Further still, while we acknowledge that Rule 404(b) provides for the introduction of "other acts" evidence to demonstrate an absence of accident, in light of the overwhelming facts in this case already tending to demonstrate that Snow had not accidentally hit Amanda, we also question whether such evidence would have withstood a proper Rule 403 challenge, considering the prejudicial nature of the "other acts."

Whether or not such evidence was admissible under Rules 404(b) and 403, however, we cannot say that its introduction was so prejudicial as to sufficiently undermine our confidence in the outcome of the trial. In being convicted of domestic battery, Snow was found to have "knowingly or intentionally touch[ed] [his spouse] in a rude, insolent, or angry manner that result[ed] in bodily injury to [his spouse] . . . ." See I.C. § 35-42-2-1.3. Upon claiming prejudice due to his counsel's ineffective assistance, Snow argues that the evidence demonstrating the battery was intentional was equivocal and that it was only the additional "other acts" evidence which would have "weigh[ed] heavily on the minds of the jurors," effectively tipping the balance in favor of a finding of

an intentional hitting. Appellant's Brief at 16. Regardless of whether the "other acts" evidence suggested Snow intentionally touched Amanda, the State needed only to prove that he "knowingly" touched Amanda. As stated earlier, a person engages in conduct "knowingly" if, "when he engages in the conduct, he is aware of a high probability that he is doing so." See I.C. § 35-41-2-2. Here, Snow conceded that he was so angry he kicked in Amanda's car. He further testified to throwing his cigarette down in such a manner that Amanda may have been burned, that he followed Amanda, yelling at her, until she was up "to" a trash can, that his finger was "up" and he was yelling and "in her face" when their heads hit. Tr. at 55. Given these circumstances demonstrating a very angry Snow face-to-face with Amanda while gesticulating angrily and aggressively in her direction, we are convinced that no reasonable trier of fact would have been so prejudiced by her vague accounts of "other acts" as to be persuaded by those "other acts" rather than by the overwhelming facts suggesting that, at the very least, the hit was "knowing." For this reason, in spite of our above reservations with respect to the admissibility of the "other acts" evidence, and by extension, the effectiveness of counsel's assistance, our confidence in Snow's conviction for domestic battery has not been undermined. Having found no prejudice, we decline Snow's claim of ineffective assistance of trial counsel.

Having concluded there was sufficient evidence to support the verdict and having determined that Snow suffered no prejudice from any alleged ineffective assistance of counsel, we affirm Snow's conviction for domestic battery.

The judgment of the trial court is affirmed.

SHARPNACK, J., and CRONE, J., concur.